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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JRD FUNDING, INC. et. al., Plaintiffs and Respondents, v. JAMES M. MORGAN et al., Defendants and Appellants.	B259030 (Los Angeles County Super. Ct. No. BC537758)

APPEAL from an order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Reversed and remanded.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman, Christina M. Guerin and Raul L. Martinez for Defendants and Appellants.

Law Offices of Nick A. Alden and Nick A. Alden for Plaintiffs and Respondents.

Appellants James Morgan, Esq., Anthony Lanzone, Esq. and their law firm, Lanzone Morgan, LLP (collectively, Lanzone Morgan) appeal from an order denying their special motion to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16,[1] in this malicious prosecution action. Lanzone Morgan represented Thu-Cuc T. Phung, Esq., and her firm, Law Offices of Thu-Cuc T. Phung, Inc. (collectively, Phung) in a lawsuit against attorney Federico Sayre and his firm, *Thu-Cuc T. Phung, Esq., et al. v. Federico Castelan Sayre, Esq., et al.*, Orange County Superior Court Case No. 30-2010-00341861 (*Sayre Action*). Phung referred a friend's out-of-state personal injury action, *Hoang v. King County/New Flyer of America, Inc. et al.* (*Hoang Action*) to Sayre, after she and Sayre reached a fee-splitting agreement requiring him to pay Phung a referral fee "of 1/3 of any attorney's fees received in the [*Hoang Action*]." The *Hoang Action* settled in June 2009 for $6 million, generating attorney fees of $2.4 million.

In fall 2009, purportedly acting on behalf of Sayre and as the business manager of Sayre's firm, respondent Eric Alden (Alden) wrote twice to Phung informing her that Sayre's financial condition was dire: Sayre had been sued for over $12 million by two secured lenders and, in addition to his debt to Phung, owed costs and referral fees in the *Hoang Action* in excess of $800,000. Some of the figures in Alden's letters were incorrect, as was much of the information. Alden tried unsuccessfully to convince Phung to accept $183,000, in place of the $800,000 referral fee to which she claimed an entitlement. Alden's letters did not disclose either that he owned one of the two lending companies that had sued Sayre, or that he owned JRD Funding, Inc. (JRD Funding), which had loaned

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1 Subsequent statutory references are to the Code of Civil Procedure.

Sayre $300,000 to cover litigation costs in the *Hoang* Action. Sayre ignored Phung's demand that he place at least $800,000 in a trust account until their fee dispute was resolved. In the *Sayre Action*, Phung sought to recover one-third of the attorney fees Sayre received in the *Hoang Action*.

Discovery conducted in the *Sayre Action* revealed that Sayre did not authorize Alden to act on his behalf in negotiations with Phung, and that Alden was not the business manager of Sayre's firm. Discovery also revealed that Sayre applied a substantial portion of the attorney fees recovered in the *Hoang Action* to repay a loan made to him by RJ Growth, LLC—another company owned by Alden—that bore no relation to the litigation. Lanzone Morgan attempted unsuccessfully to depose Alden in the *Sayre Action*. As a result of information gleaned from its work in the *Sayre Action*, Lanzone Morgan suspected Alden and his companies might be competitor creditors seeking to reduce Phung's referral to maximize their own recovery from the limited pool of attorney fees, or that they were working in concert with Sayre to avoid paying Phung's full referral fee.

In October 2010, Lanzone Morgan filed the underlying action on Phung's behalf against respondents Alden, his accounting firm and JRD Funding (collectively, the Alden Parties). The complaint alleged causes of action for, among other things, fraud, conversion and breach of contract in the purported misappropriation of Phung's share of fees from the *Hoang Action.* In mid-February 2011, after the Alden Parties' demurrer was sustained with leave to amend, Lanzone Morgan filed a first amended complaint. In March 2011, Lanzone Morgan withdrew from Phung's representation in the underlying action. Two years later the Alden Parties obtained summary judgment against Phung, then represented by her son, on a second amended complaint (SAC).

The Alden Parties filed the instant action against Lanzone Morgan for malicious prosecution. On appeal, Lanzone Morgan contends the trial court erred in denying their special motion to strike because the Alden Parties failed to make the requisite showing that Lanzone Morgan filed or prosecuted the underlying action without probable cause and with malice. We agree, and will reverse the order denying the anti-SLAPP motion.

BACKGROUND

The Fee-Splitting Agreement

Ngoc Hoang, a close friend of Thu-Cuc T. Phung, suffered a catastrophic injury in August 2005, while riding a bus operated by the City of Seattle, Washington. Phung was unable to represent Hoang in litigation in Washington. With her friend's permission, Phung referred the personal injury action to Sayre, to whom she had referred out-of-state litigation in the past. In September 2005, Hoang retained Sayre's wholly owned professional corporation, Law Offices of Federico C. Sayre (collectively, Sayre) to represent her in the *Hoang Action*.[2]

In October 2006, Phung and Sayre entered into a one-page "Attorney Referral Fee Agreement" (fee-splitting agreement), according to which Sayre agreed to pay Phung "a total [referral fee] of 1/3 of any attorney's fees received in the [*Hoang Action*], if any attorney's fees [were] received." The *Hoang Action*

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[2] The record does not contain a copy of Sayre's retainer agreement with Hoang. According to the complaint in the *Sayre Action*, the retainer provides that Sayre "shall advance the [necessary costs] on behalf of . . . [Hoang], in which case such costs are to be disbursed directly out of the proceeds of the action from [Hoang's] share of those proceeds." In discovery, Sayre both admitted and denied that the retainer agreement required him to recover litigation costs from Hoang.

settled in June 2009 for $6 million dollars. Sayre recovered attorney fees of $2.4 million, from which Phung claimed an entitlement to $800,000 under the fee-splitting agreement.

Correspondence Regarding Phung's Referral Fee

On August 19, 2009, Phung wrote to Sayre to congratulate him on settling the *Hoang Action*. Sayre responded to Phung's letter the following day, and acknowledged that he owed her an unspecified "referral share" which he expected to "be in a position to pay" in about three weeks. From September 28 through October 21, 2009, Phung made numerous unsuccessful attempts to contact Sayre to discuss the status of her referral fee.

On October 29, 2009, Phung received a two-page fax from Alden. The cover sheet stated that Alden had included a proposed referral fee allocation in the *Hoang Action* "as calculated by [his] office [Eric Alden Accountancy Corporation]." Alden requested that Phung "call [him] . . . so we can arrange a payment and release as soon as possible." The proposed referral fee allocation (hereafter, October 29 letter) stated:

"HOANG v. KING COUNTY

"FEES:	2,400,000.00
"COST OF FINANCING (JRD FUNDING)	(300,000.00)
"NET FEES:	2,100,000.00
"SEATTLE LOCAL ATTORNEY FEES	(180,000.00)
"SEATTLE 2ND ATTORNEY– FEES	(90,000.00)
"LOS ANGELES – 2ND ATTORNEY FEES	(240,000.00)
"TOTAL REFERRAL FEES PAID	(510,000.00)
"33% OF FEES	693,000.00
"PAYMENT AVAILABLE TO Thu-Cuc Phung	183,000.00"

Alden's letter did not disclose that he owned JRD Funding. Phung immediately rejected the proposed fee allocation and "instruct[ed] [Sayre's firm] to keep no less than $800,000 in its client trust account pending resolution of this matter."

On November 3, 2009, acting in his purported capacity as "business manager" for Sayre's new firm, Sayre & Levitt, Alden wrote again to Phung "in hopes of resolving [her] claim for legal fees in connection with the [*Hoang Action*]" (the November 3 letter). He informed Phung that Sayre had already "disbursed the proceeds [from settlement of the *Hoang Action*] as detailed in [his October 29 letter]," and urged her to "accept the sum of . . . $183,000.00 in full satisfaction of [her referral] fee." Alden also told Phung that, due to extreme financial pressure, Sayre was forced to close down his firm and join Sayre & Levitt as a minority partner. The November 3 letter also said Sayre was being sued by two secured lenders. One (unnamed) California lender sought approximately $3 million in damages. The other, California Lending, LLC in New York, sought about $9.5 million and was attempting to intercept Sayre's settlement proceeds. Alden said that both of these lenders either already had sought "a writ of attachment to prevent disbursement of proceeds from claims previously prosecuted by . . . Sayre," or planned shortly to do so. In his November 3 letter Alden again did not disclose that he owned JRD Funding, or that JRD Funding was the lender then suing Sayre for $3 million.

The Sayre Action

In February 2010, Lanzone Morgan filed the *Sayre Action* on behalf of Phung. The complaint alleged seven causes of action: breach of contract; fraud;

conversion; money had and received; accounting; breach of the implied covenant of good faith and fair dealing; and unjust enrichment.

In discovery responses in the *Sayre Action*, Sayre denied having directed Alden to prepare the October 29 or November 3 letters to Phung. He denied that his office performed the calculations regarding the amount of Phung's proposed referral fee, and denied directing Alden either to perform that calculation or to lie to Phung about Sayre's financial status. Sayre produced no documents in response to discovery seeking information regarding the bases upon which the $183,000 sum had been calculated. Sayre denied giving Alden any specific instruction regarding the November 3 letter, and claimed Alden had "volunteered to be an intermediary" and "drafted the letter on his own." Sayre denied that the representation in the October 29 letter stating he owed $510,000 to two sets of local counsel in Seattle and an attorney in Los Angeles was fabricated, but conceded that the $510,000 figure was not accurate.[3] At his deposition, Sayre testified that, to his knowledge, Alden's statement in the November 3 letter that he was the "business manager for the law firm of Sayre & Levitt" was not true.

In the course of the *Sayre Action*, Lanzone Morgan learned that the secured lender to which the November 3 letter referred as having a $3 million lawsuit pending against Sayre was Alden's company, JRD Funding. Documents produced in the *Sayre Action* revealed that, between September 17 and November 3, 2009, Sayre paid $264,000 to two companies owned by Alden ($164,000 to JRD

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3 Copies of checks produced in discovery by Sayre in the *Sayre Action* reflect that Sayre paid $160,000 in fees from the settlement to one local counsel in Seattle (not two as stated in the October 29 letter), and $144,000 to an attorney (in his own firm) in Los Angeles, for a total of $304,000.

Funding, and $100,000 to RJ Growth, LLC. Sayre testified that he had paid both entities "at the direction of Mr. Alden." The $100,000 paid to RJ Growth was re-payment of a loan for furniture for Sayre's office; that loan was unrelated to the *Hoang Action*. Sayre testified that he repaid RJ Growth "[b]ecause [he] was being pressured by Mr. Alden that if [he] didn't start making payments to him, that [Alden] would no longer loan money, and . . . [Sayre] needed [Alden's] money to be able to survive." Sayre also stated that Phung had been offered "7.4% of the referral fee, instead of the one third (1/3) per [the fee-splitting agreement]," because the *Hoang Action* had been "costly to litigate," and "[e]xtreme financial problems meant [he] was unable to pay [Phung] more than the [$183,000] offered." According to Sayre's discovery responses, he used the $800,000 in attorney fees from the *Hoang Action* to which Phung claimed an entitlement, to pay Alden's companies, local counsel in Washington, an attorney in Sayre's firm, and "lenders, a variety of creditors, bills, salaries, and other overhead." Lanzone Morgan attempted unsuccessfully to depose Alden during the *Sayre Action*.

The Underlying Action

On October 15, 2010, Lanzone Morgan filed the underlying action, *Thu-Cuc T. Phung, Esq., et al. v. Eric Alden, et al.* (LASC Case No. LC091501), on Phung's behalf against the Alden Parties. The initial complaint alleged causes of action for (1) fraud; (2) conversion; (3) common counts—money had and received; (4) accounting; (5) breach of the implied covenant of good faith and fair dealing; (6) unjust enrichment; and (7) negligence.

As relevant here, the complaint alleged that, in 2009, the Alden Parties loaned Sayre $4.25 million in exchange for his agreement to turn over to the Alden Parties all attorney fees he received until that debt was paid. The Alden Parties,

purportedly aware when they made the loan that Sayre owed Phung a referral fee of one-third of all attorney fees in the *Hoang Action*, aided and abetted Sayre in diverting Phung's share of the $2.4 million in attorney fees received in that case. The complaint further alleged that Alden was the bookkeeper and "business manager" for Sayre's firm, with the concomitant ability to write checks and disburse fees on the firm's behalf. Phung alleged that the October 29 and November 3 letters evidenced the Alden Parties' participation in Sayre's fraud and breach of the fee-splitting agreement. Those documents also constituted evidence of Alden's alleged purposeful effort to "short" Phung and keep most of her share of the fees from the *Hoang Action* for himself by falsely claiming she was owed only $183,000, and urging her to accept that amount in satisfaction of the fee-splitting agreement. Phung alleged that the Alden Parties converted $264,000 of the $800,000 owed her. In addition to standard agency and alter ego allegations, Phung alleged that each defendant "aided and assisted [the others] in committing the wrongful acts alleged," and proximately caused damages to Phung, who had relied in good faith on the fee-splitting agreement to her detriment.

Phung alleged that the Alden Parties committed fraud by assuming the obligations of the fee-splitting agreement without the intention to perform. Phung was unaware of the Alden Parties' true intentions, and justifiably relied on their promised performance. She would not have executed the fee-splitting agreement or referred the *Hoang Action* to Sayre had she known the Alden Parties' true intentions. As a result of the Alden Parties' misdeeds, Phung allegedly suffered damages of at least $800,000. In addition, Phung alleged that, notwithstanding her demand that $800,000 be set aside and held pending resolution of the dispute, the Alden Parties converted those funds owed to her for their own use, as evidenced by the November 3 letter. Phung also alleged that, as an accountant, Alden had a duty

to adhere to a standard of care designed, in part, to avoid injuries like the one she suffered and his breach of that duty was a direct and proximate cause of her injuries.

The Alden Parties demurred. They argued they were neither parties to the fee-splitting agreement nor liable for any wrongdoing alleged by Phung, either directly or as a result of accounting work performed for Sayre's firm. They also claimed that the fee-splitting agreement violated Rule 2-200 of the California Rules of Professional Conduct (rule 2-200),[4] and was unenforceable.

At the hearing on the demurrer the court informed Lanzone Morgan that the complaint required "some clarification," and informed Phung she could not use a civil action to make "an end run" around a then-pending bankruptcy action. The court also cautioned Lanzone Morgan to "take a long hard look at what's going on in this case," noting that Phung might be "suing the wrong party." The demurrer was sustained with leave to amend.

On February 17, 2011, Lanzone Morgan filed a first amended complaint (FAC), asserting causes of action for (1) aiding and abetting–fraud; (2) aiding and abetting–breach of contract; (3) aiding and abetting–conversion; and (4) accounting.

The FAC's allegations largely mirrored those of the initial complaint, except that it alleged that the $300,000 loan from JRD Funding to Sayre to litigate the *Hoang Action* was secured by attorney fees recovered in that action. In exchange for that loan, Sayre signed a promissory note agreeing to repay the principal plus interest accrued at five percent per month, and various fees. The FAC alleged that

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[4] Rule 2-200 requires that a client's written consent be obtained prior to any division of fees. (*Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838 (*Mink*).)

the Alden Parties knew when they made that loan that Phung had referred the *Hoang Action* to Sayre and was due one-third of any attorney fees recovered therein. The FAC alleged that the Alden Parties were liable as aiders and abettors because Alden assisted Sayre in breaching the fee-splitting agreement, and in perpetrating fraud on Phung by drafting the October 29 and November 3 letters unilaterally reducing Phung's attorney fees in an effort to get her to accept significantly less money than she was owed. The FAC also alleged that, by conceiving of, drafting and sending to Phung the October 29 and November 3 letters, the Alden Parties aided and abetted Sayre's conversion of funds owed to Phung for their own benefit. The Alden Parties demurred to the FAC. That demurrer was sustained with leave to amend in May 2011.

Meanwhile, on March 4, 2011, Lanzone Morgan withdrew from Phung's representation, and was replaced by Phung's son, Charlie Phung (a former associate at the Lanzone Morgan firm). Charlie Phung filed the SAC in June 2011. The SAC alleges causes of action for: (1) intentional interference with contractual relations, (2) conversion, and (3) conspiracy to transfer property in violation of the Uniform Fraudulent Transfer Act (UFTA) (Civ. Code, §§ 3439–3439.12).

In February 2013, the court granted the Alden Parties' motion for summary judgment motion. Judgment in their favor was entered in September 2013.

The Present Malicious Prosecution Action

In March 2014, the Alden Parties filed the instant action against Lanzone Morgan (and others who are not parties to this appeal) for malicious prosecution of the underlying action. They alleged that Lanzone Morgan lacked probable cause to file the underlying action because it knew or should have known that no Alden Party was a signatory to the fee-splitting agreement, and none owed any duty to

Phung. They also alleged that Lanzone Morgan maliciously persisted in prosecuting the underlying action notwithstanding the trial court's warning that Phung might be "suing the wrong party."

Lanzone Morgan responded by filing an anti-SLAPP motion seeking to strike the malicious prosecution action. The trial court found the underlying action had been brought without probable cause and with malice, and denied the motion. This appeal followed. (§ 425.16, subd. (i); 904.1, subd. (a)(13).)

DISCUSSION

Lanzone Morgan contends that the court erred in denying its anti-SLAPP motion because the Alden Parties failed to meet their burden to show that the underlying action was brought or prosecuted without probable cause and with malice. We agree.

1. *Controlling Law and the Standard of Review*

The anti-SLAPP statute provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) The purpose of the statute is to provide an expedited procedure to obtain dismissal of meritless litigation aimed at chilling the exercise of First Amendment rights. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1292.)

The trial court uses a two-step test in ruling on an anti-SLAPP motion. First, the defendant must make a threshold showing that a cause of action arises from

protected activity, i.e., an act in furtherance of the right of petition or free speech. (§ 425.16, subd. (b)(1); *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965 (*Zamos*).)

If the defendant makes this threshold showing, the burden shifts to the plaintiff to demonstrate a probability it will prevail on the claim. (*Zamos, supra,* 32 Cal.4th at p. 965.) The plaintiff satisfies this burden if it can "'demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*); see also *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*).) Plaintiff's burden is not cumbersome; it need only show its case has "minimal merit." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 95, fn. 11.) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 89, italics omitted.)

We review a trial court's denial of an anti-SLAPP motion de novo, employing the same two-part test. (*Soukup, supra,* 39 Cal.4th at p. 269, fn. 3; *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1387.) In determining whether the trial court properly denied the motion, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) As with a motion for summary judgment, a plaintiff opposing an anti-SLAPP motion "must adduce competent, admissible evidence" to establish a prima facie showing. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 614.)

2. *The Claim Arose from Protected Activity*

As the Alden Parties concede, it is settled that their claim for malicious prosecution arises from protected activity; *viz*., Lanzone Morgan's initiation and prosecution of the underlying action. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 (*Jarrow Formulas*); *Soukup, supra*, 39 Cal.4th at p. 291 ["'By definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.' . . . The filing of lawsuits is an aspect of the First Amendment right of petition."].) Thus, the burden shifted to the Alden Parties to show a probability of prevailing on their claim. (*Soukup, supra*, 39 Cal.4th at pp. 278–279.) They did not satisfy that burden.

3. *The Alden Parties Failed to Establish a Probability of Prevailing on Their Claim for Malicious Prosecution*

To establish a probability of prevailing on their malicious prosecution claim, the Alden Parties had to make a minimal showing that the underlying action was (1) prosecuted by Lanzone Morgan and terminated in their favor, (2) brought without probable cause, and (3) initiated or prosecuted with malice. (*Zamos, supra*, 32 Cal.4th at pp. 966, 973.) The malicious prosecution claim fails unless the plaintiff can establish each element. (*StaffPro, Inc. v. Elite Show Services, Inc.* (2006) 136 Cal.App.4th 1392, 1398 (*StaffPro*).) The trial court found that the Alden Parties made the requisite showing as to all three elements. We conclude otherwise. Although the Alden Parties satisfied the first element, they fell short in their effort to establish the second and third elements and failed to show a probability of prevailing on their malicious prosecution claim.

a. *Favorable Termination of Underlying Action*

There is no dispute that the underlying action was prosecuted by Lanzone Morgan and terminated in the Alden Parties' favor after the trial court granted them summary judgment, unambiguously declaring them not liable on Phung's claims in the underlying action. (See *Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 881 [favorable termination occurs on entry of an order that a cause of action lacks merit].)

b. *The Alden Parties Failed to Show a Lack of Probable Cause to Sue for Fraud*

Probable cause exists unless all reasonable attorneys would agree an action is completely devoid of any merit. (*Jarrow Formulas, supra*, 31 Cal.4th at p. 743, fn. 13.) The threshold showing for probable cause is *very* low: "Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious." (*Wilson, supra*, 28 Cal.4th at p. 822; see also *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 927 (*Uzyel*) ["[p]robable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims *even if the claims are extremely unlikely to succeed*," italics added].) Whether probable cause exists to prosecute an action in light of facts known to the malicious prosecution defendant is a legal question to be determined objectively by the court. (*Wilson, supra*, 28 Cal.4th. at p. 817; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 (*Sheldon Appel*).)

Applied here, this standard required the Alden Parties to show, based on facts known to Phung's attorneys at the time the initial and first amended complaints were filed, that no reasonable attorney evaluating the claims alleged would have believed they were legally tenable. (*Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1271 (*Marijanovic*); *Zamos, supra*, 32 Cal.4th at p. 971.) Lanzone Morgan submitted declarations and a lengthy compendium of evidence in support of its anti-SLAPP motion setting forth the evidence obtained before filing and upon which it relied to prosecute the underlying action based principally on theories that the Alden Parties committed or aided and abetted the commission of fraud, and aided and abetted conversion.[5]

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[5] We need not determine whether the Alden Parties made a sufficient showing of a lack of probable cause or the presence of malice with respect to the claims (common counts, negligence, and breach of the implied covenant of good faith and fair dealing) dropped after demurrers were sustained to the complaint and FAC. First, except for three or four paragraphs of their 51-page brief, the Alden Parties make no substantive appellate arguments regarding these claims.

Second, even had they done so, we would not address those arguments because an attorney's decision not to continue to prosecute a cause of action does not reflect on its merit. "Favorable termination 'is an essential element of the tort of malicious prosecution, and it is strictly enforced.'" (*StaffPro, supra*, 136 Cal.App.4th at p. 1400.) Dismissal of a proceeding is insufficient; rather, "the termination must reflect on the merits of the action . . . ." (*Contemporary Services, Corp. v. Staff Pro Inc*. (2007) 152 Cal.App.4th 1043, 1056.) "To allow a malicious prosecution suit to be based on a cause of action dropped from an amended complaint would discourage amendment of pleadings to delete theories which come to appear untenable. . . . Since litigants should be encouraged to amend pleadings to drop groundless causes of action, such amendments cannot create a basis for liability for malicious prosecution." (*Jenkins v. Pope* (1990) 217 Cal.App.3d 1292, 1301.)

Nor do we address malicious prosecution as it relates to the UFTA claim, which was asserted only after Lanzone Morgan ceased its representation of Phung. The Alden Parties mistakenly assert that prosecution of claims by successor counsel renders Lanzone Morgan liable as a "joint tortfeasor." But an attorney may be liable for malicious prosecution only if he or she *files or prosecutes* a claim without probable cause

First, in the October 29 and November 3 letters obtained by Lanzone Morgan in the *Sayre Action*, Alden claims or strongly implies that he is acting on Sayre's behalf or as his agent, i.e., the accountant and/or business manager of Sayre's firm. Yet, other evidence disclosed in that action could reasonably have led Lanzone Morgan to believe Alden acted alone and sent the letters to promote his personal or his companies' financial interests. Sayre testified and/or provided discovery responses in the *Sayre Action* denying Alden was the business manager for either of his firms, and denying that he either directed Alden to prepare the letters or instructed him regarding their content. Sayre also denied that he or his staff were responsible for calculating the $183,000 referral fee proposed to Phung, denied knowing how that figure had been determined, and produced no documentation supporting the sum. Indeed, Sayre conceded that the figures in Alden's October 29 letter inaccurately stated the amount of fees owed in the *Hoang Action*.

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and with malice. The Alden Parties cite no authority to support their assertion that the acts or strategic decisions of subsequent counsel may be imputed to predecessor counsel, particularly where, as here, the predecessor has formally withdrawn and there is no evidence it has played any further role in prosecuting an action.

Moreover, any theory that Lanzone Morgan and Charlie Phung are liable as "joint tortfeasors" is necessarily predicated on a foundational determination that Lanzone Morgan was a tortfeasor, *viz*., that it initiated or prosecuted the underlying action without probable cause, a premise we reject, as discussed above. If the probability of prevailing on a malicious prosecution claim depends on a showing that counsel pursued litigation without probable cause and motivated by malice, rudimentary logic dictates that the predecessor cannot be responsible if subsequent counsel files a new claim without probable cause, let alone that the uninvolved predecessor was motivated by malice to do so. The Alden Parties' reliance on the fact that Charlie Phung once worked for Lanzone Morgan is insufficient evidence that the firm itself played any role in the underlying litigation after March 2011.

Second, it was not unreasonable for Lanzone Morgan to conclude that Alden purposefully put false or misleading information in his letters to convince Phung that much less money was available and to persuade her to accept far less than the $800,000 referral fee she believed was due. Specifically, the October 29 letter states Sayre owes referral fees of $510,000 to two Seattle firms, as well as to counsel in Los Angeles. Sayre admitted this was false. He testified that he had retained a single Seattle firm as local counsel, and produced evidence showing that firm was paid $160,000 (not $270,000 as stated in Alden's letter). Sayre also produced evidence of his payment of $144,000 to an attorney in his own firm, $96,000 less than Alden claimed the attorney was owed. Further, Phung and her attorneys believed that Phung was the sole referral source that had lead to Sayre's retention in the *Hoang Action.* In that case, Alden's claim that *any* other attorney was entitled to "referral fees" could not be true.

Third, the October 29 letter states that Sayre owed $300,000 to JRD Funding to cover the "cost of financing" the *Hoang Action*. However, Phung alleged that the terms of Sayre's retention agreement require that litigation "costs" must be taken, not from any attorney fees recovered, but "directly out of the proceeds of the action *from the* [*client's*] *share of those proceeds*." (Italics added.)

Fourth, Alden misleadingly failed to disclose in either of his letters to Phung that he owned JRD Funding. Had he done so, Phung would have been alerted to the possibility that Alden was not acting solely on Sayre's behalf. Rather, he could well be acting as a creditor competing with Phung for funds from a limited pool of fees, or assisting Sayre to avoid liability under the fee-splitting agreement, thereby leaving more money for the Alden Parties. Lanzone Morgan found Alden's concealment of such information particularly suspicious because, while purportedly acting as the "business manager" of Sayre's firm, Alden failed to

disclose that a primary cause of Sayre's disastrous financial status was the fact that one of the creditors in the multi-million lawsuit against Sayre was Alden's own company.

Finally, documents produced in the *Sayre Action*, revealed Sayre used $164,000 of the $800,000 Phung to which claimed an entitlement— and had demanded be kept in trust pending resolution of the fee dispute—to reimburse JRD Funding for costs in the *Hoang Action*, and another $100,000 of those funds to pay a different Alden company for a loan (for furniture) unrelated to the litigation.

The Alden Parties argue none of this evidence was sufficient to establish probable cause to initiate the underlying action because: (1) they were not parties to the fee-splitting agreement, (2) there is no evidence they knew the fee-splitting agreement existed before Sayre had breached it, and (3) the fee-splitting agreement violates rule 2-200 and is unenforceable. We find no merit in these assertions, but turn first to an evidentiary issue.

(i) *Erroneous Evidentiary Ruling*

As they did below, the Alden Parties rely primarily on the declarations Alden and Sayre submitted in support of the summary judgment motion in the underlying action to demonstrate an absence of probable cause. But those declarations contain incompetent evidence not addressed to the question of probable cause. That issue turns on an objective determination of what Lanzone Morgan knew when it filed the underlying action.[6]

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[6] We review the trial court's rulings on evidentiary objections in connection with an anti-SLAPP motion for abuse of discretion. (See *Hall v. Time Warner, Inc*. (2007) 153 Cal.App.4th 1337, 1348, fn. 3.)

The Alden and Sayre declarations contain information about (1) a long-standing business relationship between JRD Funding and Sayre, (2) communications between them regarding JRD Funding's financing of the *Hoang Action*, (3) Alden's involvement in Sayre's bankruptcy, and (4) allegations in the SAC. This information is largely irrelevant to the issue of what Lanzone Morgan knew at the time it filed and prosecuted the underlying action through filing of the FAC. The declarations are not probative on the issue of probable cause, and the trial court erred in overruling Lanzone Morgan's objection to their admission. (See *Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 514 (*Morrison*), disapproved on another ground by *Zamos, supra*, 32 Cal.4th at p. 973 [declaration that fails to identify facts imparted to attorneys to put them on notice that client's claim was untenable is inadmissible]; *Sheldon Appel, supra*, 47 Cal.3d at p. 878 [element of probable cause requires objective determination by trial court "whether, *on the basis of the facts known to [counsel]*, the *institution* of the prior action was legally tenable"], italics added.)

(ii) *The Alden Parties' Substantive Arguments Lack Merit*

Turning to the substantive claims, the Alden Parties argue that Lanzone Morgan lacked probable cause to pursue the underlying action for fraud because none of them was a party to the fee-splitting agreement, and they may not have known of that agreement until after settlement in the *Hoang Action*.[7] These

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[7] "[T]he elements of fraud, which are: '(1) representation; (2) falsity; (3) knowledge of falsity; (4) intent to deceive; and (5) reliance and resulting damage (causation).' [Citation.]" (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291 (*Vega*).) "Active concealment or suppression of facts by a nonfiduciary 'is the equivalent of a false representation, i.e., actual fraud.' [Citation.]" (*Ibid.*)

contentions are mere diversions. Lanzone Morgan did not assert that any Alden Party signed the fee-splitting agreement. Rather, Lanzone Morgan maintains that the Alden Parties failed to satisfy their burden to show an absence of probable cause because Lanzone Morgan reasonably could conclude that Alden's October 29 and November 3 letters, coupled with other evidence revealed in the *Sayre Action*, reflected fraud on Alden's part. They could reasonably conclude that Alden misrepresented facts and his role as Sayre's emissary in order to protect his own interests, or to purposefully assist Sayre in breaching the fee-splitting agreement by misrepresenting the referral fees outstanding in order to induce Phung to accept a much lower fee based on the implied threat that she might otherwise receive nothing because of the pending lawsuits against Sayre.

Lanzone Morgan argues it was not unreasonable to believe Alden committed (or aided and abetted the commission of) fraud by concealing both that the unnamed "California company" suing Sayre for $3 million was actually JRD Funding, and that he owned that company, which also claimed an entitlement to $300,000 from the attorney fees for litigation costs advanced in the *Hoang Action*. The Alden Parties argue that Alden had no obligation to disclose this information and there is no evidence Phung relied on either letter to her detriment. Not so. Even if Alden had no independent duty to Phung, once he stepped in to try to convince her to accept a vastly reduced fee, he assumed an obligation to be truthful. Fraud may be found "where a party '[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated.'" (*Vega, supra,* 121 Cal.App.4th at p. 294; see also *Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194,

201 ["One who . . . volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud"].)

Further, the reliance necessary to establish fraud may be shown by one's forbearance (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 171), and is presumed—or at least inferred—where material facts are concealed or misrepresented. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976–977.) Lanzone Morgan could reasonably presume that Phung took no immediate action to protect her interests, relying on what was later revealed to be half-truths and misleading information, and that she would have taken steps to protect herself—such as seeking court protection through a provisional remedy to preserve the funds and protect her rights until the fee dispute was resolved—had she received full and truthful information. To state a claim of fraudulent concealment, Phung need only allege (as she did here) that she would have behaved differently had the omitted material information been disclosed. (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093.)

We also reject the Alden Parties' contention that Lanzone Morgan lacked probable cause to pursue the underlying action because the fee-splitting agreement violates rule 2-200 and is unenforceable because Phung failed to obtain written client consent at the outset. "The rule requires that the client's written consent [be obtained] prior to any division of fees. This simple dictate cannot reasonably be read to require the client's written consent be obtained prior to the lawyers' entering into a fee-splitting arrangement, or prior to the commencement of work, or at any time other than prior to any division of fees." (*Mink, supra,* 121 Cal.App.4th at p. 838.) Lanzone Morgan argued that Hoang's written consent was obtained on November 7, 2009, prior to a final division of fees. The Alden Parties claimed otherwise, asserting Hoang's consent was obtained after Sayre distributed

fees on or before November 3, 2009. But the Alden Parties did not definitively establish that Hoang's consent was obtained after a final fee division, as the question of the proper division of fees remained at issue in both the *Sayre* and underlying actions. Further, Phung provided evidence she obtained Hoang's oral consent to the fee-splitting agreement long before November 3, 2009, and that Sayre acknowledged he owed referral fees to Phung, and intended to honor the fee-splitting agreement. At the very least, Phung could assert an entitlement to quantum meruit recovery.[8] (Cf. *Olsen v. Harbison* (2010) 191 Cal.App.4th 325, 331 ["if two law firms negotiate a fee-sharing agreement without obtaining the written consent of the client, a firm providing services under this agreement can obtain a quantum meruit recovery from the other firm for the reasonable compensation for its services"].) On these facts the Alden Parties failed to show an absence of probable cause because a reasonable attorney could argue the fee-splitting agreement was enforceable, even if he or she may also have believed the claim unlikely to prevail. (See *Wilson*, *supra*, 28 Cal.4th at p. 822; *Uzyel*, *supra*, 188 Cal.App.4th at p. 927.)

The Alden Parties failed to satisfy their obligation to establish the absence of probable cause to pursue a fraud claim. At a minimum, Lanzone Morgan had reason to doubt Sayre's denials that Alden played a leading (or any) role in the misdeeds committed against Phung. An attorney "'may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of

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8 Recovery under a quantum meruit theory does not require proof of the existence of an enforceable contract, only a showing that "the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made' [citations]." (*Huskinson & Brown v. Wolf* (2004) 32 Cal.4th 453, 458.)

whether . . . the client's adversary is truthful, so long as that issue is genuinely in doubt.'" (*Morrison, supra,* 103 Cal.App.4th at p. 513.)

c. *Failure to Establish Absence of Probable Cause for Conversion Claim*

The Alden Parties' contention that Lanzone Morgan lacked probable cause to pursue a claim for conversion rests primarily on their assertion that there can be no liability for conversion absent a showing that Sayre segregated the $800,000 in dispute and paid Alden's companies from that fund.[9] This is incorrect.

A viable "conversion claim does not require that a specific lump sum of money be entrusted to the defendant; the plaintiff must merely prove a specific, identifiable sum of money that was taken from it." (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 216; *Haigler v. Donnelly* (1941) 18 Cal.2d 674, 681.) There is no requirement that the ascertainable amount of money have been held in trust—only that it be misappropriated. (*Ibid*.) A third party who interferes with plaintiff's property rights may be liable for conversion. (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 605 (*Hartford*).) If an agent is required to turn over a definite sum received by him on his principal's account, a claim for

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9 We need not address the Alden Parties' assertion that JRD Funding had priority over Phung's debt because its loan was subject to a promissory note secured by proceeds from the *Hoang Action*, and a recorded UCC-1. No competent evidence supports this contention. First, the Alden Parties presented no evidence that Lanzone Morgan was aware of a UCC-1 when they filed the underlying action. Second, the trial court sustained Phung's objection to the declaration of the Alden Parties' counsel, by which they sought to introduce the UCC-1 into evidence. The Alden Parties did not seek appellate review of that ruling, which is now final. Third, as discussed above, the trial court erred in failing to sustain the objections to the Alden and Sayre declarations, the only alternative method by which the Alden Parties sought to introduce the UCC-1.

conversion is proper. (*Haigler, supra,* 18 Cal.2d at p. 681.) To establish a claim of conversion, the plaintiff must show (1) ownership or right to possession of the property when the conversion occurred; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. (*Hartford, supra,* 96 Cal.App.3d at p. 598.) Conversion is a strict liability tort; "questions of good faith, lack of knowledge and motive are ordinarily immaterial." (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544.)

Lanzone Morgan alleged sufficient facts showing Phung claimed a right of possession or ownership to an identifiable sum ($800,000, or one-third of the $2.4 million attorney fees received in the *Hoang Action*) in early November when that sum was wrongfully converted and she was damaged as a result. Phung's counsel could reasonably believe Alden was no innocent bystander in this endeavor. Lanzone Morgan had evidence indicating that Alden drove or actively participated in the effort to induce Phung to accept far less in fees than she was owed by concealing pertinent facts about his own role and his companies' status as Sayre's creditors. To that end, he also overstated the amount of fees Sayre allegedly owed to other attorneys, and directed Sayre (on threat of cutting off future funding) to divert at least $100,000 of the disputed $800,000 to repay his company for a loan unrelated to the *Hoang* litigation. On these facts, it cannot be said that no reasonable attorney could believe Phung could state a legally tenable claim for conversion.

Moreover, Lanzone Morgan pled a colorable claim that the Alden Parties were liable for aiding and abetting Sayre's conversion of fees due Phung. Aiding and abetting liability may "'be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so

act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.'" (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326.) "An agent who assists . . . the principal to commit a tort is normally himself liable as a joint tortfeasor for the entire damage." (Rest.2d Agency, § 343, com. d.) Lanzone Morgan reasonably could argue that Alden substantially assisted Sayre in committing conversion by (1) falsely representing in the October 29 and November 3 letters that he was acting on behalf of Sayre and/or his firm, (2) falsely representing both that Sayre owed referral fees to other attorneys and the amount of those fees, and (3) concealing the fact that his own company sought to recover $3 million from Sayre.

Under the lenient probable cause standard for malicious prosecution, it cannot be said that no reasonable attorney would have believed that a claim against the Alden Parties for aiding and abetting conversion was tenable.

d. *No showing Lanzone Morgan was Motivated by Malice*

The Alden Parties also fell short of establishing the third element of their malicious prosecution claim, i.e., that the underlying action was brought with "malice." For this reason alone Lanzone Morgan's anti-SLAPP motion should have been granted, irrespective of whether the Alden Parties established a lack of probable cause.

The trial court found the "the malice element [was] proved by a lack of filing of probable cause and the fact [the case was filed or pursued] for improper motive"; i.e., that the Alden Parties had only been sued for their "deep pockets." The trial court also found malice had been shown because there was no evidence

that Alden did "anything nefarious," and he was sued simply because "he was the last man standing and they were going to get a settlement out of him."

"'The "malice" element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than . . . the satisfaction . . . of some personal or financial purpose. [Citation.] The plaintiff must plead and prove *actual ill will or some improper ulterior motive*.' [Citations.] Malice 'may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.' [Citation.]" (*Soukup, supra*, 39 Cal.4th at p. 292, some italics added; *Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 224 (*Daniels*).) Malice may be may be formed before or after a complaint is filed (*Daniels, supra*, 182 Cal.App.4th at p. 226), because "[c]ontinuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset." (*Zamos, supra*, 32 Cal.4th at p. 969.)

Although an absence of probable cause may raise an inference of malice, it does not automatically do so. (*Daniels, supra*, 182 Cal.App.4th at p. 225 ["a lack of probable cause in the underlying action, by itself, is insufficient to show malice"].) "'Merely because the prior action lacked legal tenability, as measured *objectively . . . without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's *subjective* malicious state of mind.' [Citation.]" (*Jarrow Formulas, supra*, 31 Cal.4th at p. 743, some italics added; *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 455 [same].) In short, "malice must be established by other, additional evidence." (*Downey Venture v. LMI Ins. Co*. (1998) 66 Cal.App.4th 478, 498.)

We conclude that the evidence failed to show malice. First, whether Alden engaged in nefarious conduct bears no relevance to Lanzone Morgan's state of mind in filing and prosecuting the underlying action.

Second, although malice may be found where an action has been brought to force a settlement unrelated to the merits of a claim (*Daniels, supra*, 182 Cal.App.4th at p. 224), there is no evidence in the record that Lanzone Morgan initiated settlement discussions or made any settlement demands, let alone that it did so to force a settlement unrelated to the merits.

Third, we are unpersuaded that the evidence suggests the underlying action was brought to extract a settlement from the Alden Parties' "deep pockets." Our review of the record reveals no evidence that Lanzone Morgan was driven by this factor to file the underlying action. However, even if it was, it is not improper for counsel to pursue a party it reasonably believes may bear legal responsibility for a client's injuries and has the financial wherewithal to satisfy a judgment.

Fourth, the judge's "warning" to Lanzone Morgan at the time it sustained the demurrer to the complaint that Phung might be suing the wrong party goes no further in establishing malice than it did to show an absence of probable cause. The comment was made in the context of a ruling on a demurrer, in which the court was viewing the case based solely on the pleadings, not based on facts known by or the subjective motivation of counsel. A judge's statements regarding the perceived merits of an action based on the pleadings are not probative of a lack of probable cause or the presence of malice. (*Marijanovic, supra*, 137 Cal.App.4th at p. 1272.)

Nor can we infer malice simply because Lanzone Morgan persisted in prosecuting the underlying action (filing the FAC) after the comment. The comment was directed at the question whether Phung could ultimately prevail, not

whether she had a legally tenable claim. Further, the court sustained the demurrer with leave to amend so it could not have concluded there was no possibility Lanzone Morgan could plead a viable claim. Counsel may file lawsuits they believe are correct, even if unlikely to succeed. (*Sheldon Appel, supra,* 47 Cal.3d at p. 885.) Phung's counsel had a duty to exercise its professional judgment and make a considered determination whether and how to proceed with the action after the demurrer was sustained with leave to amend; they would have been remiss to dismiss the entire action based on a judge's speculation. (Cf., *Marijanovic, supra*, 137 Cal.App.4th at p. 1272, fn. 5 ["it could well constitute malpractice for an attorney to drop a lawsuit, for which supporting evidence existed, merely because opposing counsel asserted the action was baseless"]; *Zamos, supra,* 32 Cal.4th at p. 970, fn. 9 [even though party's interrogatory response appears to present a complete defense, plaintiff's counsel still acts reasonably by proceeding with that party's deposition, because the party's "testimonial examination [may] prove less than solid"].)

Fifth, our review of the record reveals no evidence the underlying action was motivated by any ill will or ulterior motive. Phung's attorneys Lanzone and Morgan each submitted a declaration stating he harbored no malice, hostility or ill will in prosecuting the underlying action. Lanzone, who bore primary responsibility for Phung's representation, declared that his only motive had been to act as a "zealous advocate" on behalf of a client whom he believed had viable claims against the Alden Parties.

In conclusion, the Alden Parties presented no affirmative evidence of malice. Accordingly, even if they had been able to establish an absence of probable cause, the anti-SLAPP motion should have been granted. (See *Daniels, supra*, 182 Cal.App.4th at pp. 224, 227 [notwithstanding plaintiff's showing of a

lack of probable cause, anti-SLAPP motion was meritorious where no malice was shown because plaintiff failed to present affirmative evidence of "'actual ill will *or* [an] *improper* ulterior motive'"].) The Alden Parties failed to make the requisite showing as to two of elements of their malicious prosecution claim and failed to demonstrate a probability of prevailing. The court erred in denying the anti-SLAPP motion.

DISPOSITION

The order denying the special motion to strike pursuant to Code of Civil Procedure section 425.16 is reversed. The matter is remanded to the trial court with directions to enter a new order granting the motion. Appellants are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. COLLINS, J.